No. 3956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES E. WARREN and MABEL D. WARREN,
Plaintiffs in Error,

vs.

F. GENN BROMLEY,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

EDWIN A. WILCOX,
FRY & JENKINS,
San Jose,
BERT SCHLESINGER,
First National Bank Building, San Francisco,
Attorneys for Plaintiffs in Error and Petitioners.

No. 3956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES E. WARREN and MABEL D. WARREN,
Plaintiffs in Error,

vs.

F. GENN BROMLEY,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We do not seek to controvert the principles of law announced by the learned Circuit Judge in the opinion filed. No request for general or special findings was made by either side. But the formal submission of this case was made only after the filing of briefs therein; and in the closing brief of the plaintiffs in error a request was made in general terms that judgment be rendered in favor of the

plaintiffs in error. This fact does not appear in the record, however, and it may be that plaintiffs in error cannot on that account take advantage of the request thus made. Hence, we do not feel justified in asking for a rehearing upon that ground.

We confidently submit, however, that nothwithstanding the failure to ask the trial court for findings, it is, nevertheless, incumbent upon the Appellate Court to review the rulings of the trial court made during the progress of the trial and appearing in the record.

In the case of *Dunsmuir v. Scott,* 217 Fed. Rep. 200, 202, the Circuit Court of Appeals said in part:

> "Under the provisions of Act March 3, 1865, 13 Stat. 501, Rev. St. Secs. 649, 700 (U. S. Comp. St. 1913, Secs. 1587, 1668), the rule is well settled that if a jury trial is waived, and a general finding is made by the court, *review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions,* and that the bill of exceptions cannot be used to bring up the oral testimony for review. *Norris v. Jackson,* 9 Wall. 125, 19 L. Ed. 608; *Dirst v. Morris,* 14 Wall. 484, 491, 20 L. Ed. 722; *Grayson v. Lynch,* 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230; *Streeter v. Sanitary District of Chicago,* 133 Fed. 124, 66 C. C. A. 190; *Hill v. Walker,* 167 Fed. 241, 256, 92 C. C. A. 633; *W. L. Perkins & Co. v. Von Baumbach,* 185 Fed. 265, 107 C. C. A. 371; *New York Life Ins. Co. v. Dunlevy,* 214 Fed. 1, 130 C. C. A. 473. * * *"

On page 256 of the transcript of record filed in this case the following is set forth under the heading of assignment of Errors:

> *"That the Court erred in not holding that the decision of the Superior Court of the State of California for the County of Santa Clara sustaining the demurrer to the complaint for the same cause of action and between the same parties constituted a bar to the action herein."*

It appears from the transcript of record, pages 69 to 96, inclusive, that counsel for plaintiffs in error tendered an amendment to the answer in this action in the trial court based upon the following ground and to the following effect: That a complaint practically identical with the complaint in this action, and involving the same transaction, was filed in the Superior Court of Santa Clara County prior to the filing of a complaint in this action (Tr. p. 1 and p. 71). A demurrer thereto was filed setting up the ground that the complaint failed to state facts sufficient to constitute a cause of action (Tr. p. 89). The demurrer was heard and sustained by the court and an order and written opinion was filed based upon the merits of the case (Tr. pp. 93-94).

In support of the requested amendment, counsel for plaintiffs in error proffered to the trial court a certified copy of the complaint (Tr. p. 71), a certified copy of the demurrer (Tr. p. 89), a certified copy of the order sustaining demurrer (Tr. p. 93), and a certified copy of the order and opinion of

the court (Tr. p. 94). Counsel for plaintiffs in error duly excepted to the action of the court (Tr. p. 96) and has assigned error (Assignments, Tr. p. 256).

The matter of the prior action in the Superior Court for the County of Santa Clara and the order of that court sustaining the general demurrer to the complaint in that action is referred to on pages 20 and 21 of the opening brief of plaintiffs in error filed in this honorable court.

We submit that the trial court erred in failing to allow the amendment to the answer requested by counsel for plaintiffs in error. For, according to the authorities, the order of the Superior Court of the State of California for the County of Santa Clara, sustaining a general demurrer to the complaint, filed previously to and being practically identical with the complaint herein and embracing the same transaction and between the same parties, constitutes a bar to this action, it being the decision of a trial upon the merits. This question was fully and fairly presented to the lower court but the court refused leave to amend, holding that an alien may resort to either the State or Federal tribunal and could dismiss his case in the State court after demurrer and decision and proceed anew in the Federal court (Tr. p. 95).

When a party files an action in a State court and thereby elects his tribunal and submits to its jurisdiction, he may not thereafter prosecute an identical action in the

Federal court when such action in the State court either (1) has reached a determination, or (2) remains open for mere formal entry of judgment after decision.

The defendant in error by an attempted dismissal after a demurrer in the Superior Court had been sustained could not have invoked the jurisdiction of the Federal courts.

Section 581 of the Code of Civil Procedure of the State of California provides as follows:

> "An action may be dismissed, or a judgment of non-suit entered, in the following cases: 1. By the plaintiff himself, by written request to the clerk, filed among the papers in the case, at any time before trial, upon payment of costs; provided a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant."

In *Goldtree v. Spreckels,* 135 Cal. 666 (uniformly followed) the Supreme Court of this State has definitely held that the term "trial", within the meaning of section 581, subdivision 1, of the Code of Civil Procedure, and otherwise, includes the hearing of a general demurrer, and that

> "*When a general demurrer to a petition is sustained, and the plaintiff declines to amend, he practically confesses that he has alleged in his pleading every fact he is prepared to prove in support of his action.* Therefore, in such a case, nothing remains to be done except to render judgment for the defendant."

The court in that case said, among other things:

> "The Code of Civil Procedure declares that issues arise on the pleadings, and are of two

kinds,—namely, of law and of fact. (*Code Civ. Proc.,* sec. 588.) 'An issue of law must be tried by the court, unless it is referred by consent.' (*Code Civ. Proc.,* sec. 591.)

In *Tregambo v. Comanche etc. Mining Co.,* 57 Cal. 501, the court said: 'A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When the court hears and determines any issue of fact or of law, for the purpose of determining the rights of the parties, *it may be considered a trial.*' In that case the issue presented was on the application to set aside the default entered against the defendant and allow it to answer, and this motion was made before the trial on the merits. The point decided was that it was a 'trial' within the meaning of the word as used in section 650 of the Code of Civil Procedure.

So it was held in *Finn v. Spagnoli,* 67 Cal. 330,—that the hearing and *disposition of a motion for a new trial is a trial.*

A statute of the United States providing for the removal of causes required the filing of the petition to be 'at or before the term at which said cause could be first tried, and before the trial thereof'. What was meant by the term 'trial', used in this statute, was decided in *Alley v. Nott,* 111 U. S. 472, opinion by Chief Justice Waite. The suit was begun in the supreme court of New York. Demurrers to the complaint were interposed on the ground 'that it did not state facts sufficient to constitute a cause of action'. The issues of law raised by the demurrers were brought to trial, and the court overruled the demurrers, with leave to defendants to amend, and in default of doing so judgment was to be entered for plaintiffs. Notice of appeal was served, and stay of execution on the interlocutory judg-

ment was moved, and further time to answer given. Finally, the appeals were withdrawn, and also the demurrers, answers filed, and a petition was filed for the removal of the suit to the circuit court of the United States for the southern district of New York. The circuit court, on motion, made an order remanding the cause, and the appeal to the United States supreme court was from this order, where it was held that the petition was not in time. Various sections of the New York Code of Civil Procedure are cited,—as to what are issues, how an issue of law arises, that upon a decision of a demurrer the court may, in its discretion, allow the party in fault to plead anew or amend, that an issue of law must be tried by the court, that after joinder of issue either party may serve a notice for a trial,—all of which are similar to the provisions of our code. The learned chief justice then says: 'A demurrer to a complaint that it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties, which can be pleaded in bar to any other suit for the same cause of action. Under such circumstances, *the trial of an issue raised by a demurrer which involves the merits of the action is, in our opinion, a trial* of the action within the meaning of the act of March 3, 1875.' *The language of the act is 'at or before the term at which said cause*

*could be first tried, and before the trial thereof'. The language of our code is 'at any time before trial'. There is no perceivable difference between the two acts. We cannot see why it is not true, as was said in Tregambo v. Comanche etc. Mining Co., 57 Cal. 501, that 'when a court hears and determines any issue of * * * law for the purpose of determining the rights of the parties, it may be considered a trial'; and a general demurrer, challenging the sufficiency of the facts, goes directly to the determination of the rights of the parties and all rights involved in the complaint.*

* * * * * * *

Under a code provision the same as that in the Ohio code the question came before the Nebraska supreme court in *State v. Scott,* 22 Neb. 628. A general demurrer had been argued and submitted in the lower court on July 6, 1887, and a decision agreed upon, the docket entry being 'July 6, writ denied'. The court thereupon adjourned until September 20, 1887. On September 2, 1887, the relators attempted to dismiss the action by filing a voluntary dismissal the attorney-general objected and asked that the attempt to dismiss be disregarded, and that judgment be rendered. The court cited *Beaumont v. Herrick,* 24 Ohio St. 446, stating that the Nebraska and Ohio codes were identical, and quoted the paragraph found above. Other cases were also cited to the same effect, the court continuing: '*No case has been cited where under a statute like ours a plaintiff as a matter of right can dismiss his action after it has been submitted to the court.* If he could do so, litigation would become interminable, because a party who was led to suppose a decision would be adverse to him could prevent such decision and begin anew, thus subjecting the defendant to annoying and continuous litigation. The statute, therefore, limits the right

of the plaintiff to dismiss to the final submission of the case. In the case under consideration the relators had set forth all the facts upon which they relied for the writ, and the case was finally submitted to the court, which determined that the facts were not sufficient to entitle realtors to the relief prayed for. *The motion to dismiss, therefore, was unavailing, and the judgment rendered July 6th denying the writ will now be entered of record.'* The demurrer was then considered and sustained. The same view is expressed in *Scherff v. Missouri Pacific Ry. Co.,* 81 Tex. 471. The court said: 'When a general demurrer to a petition is sustained, and the plaintiff *declines* to amend, he practically confesses that he has alleged in his pleading every fact he is prepared to prove in support of his action. Therefore, in such a case, nothing remains to be done except to render judgment for the defendant. Since the defendant by his demurrer has admitted all the facts of the plaintiff's case, we see no reason why the judgment should not be regarded as a conclusive determination of the litigation on its merits. So, also, if the plaintiff takes leave to amend, but fails to do so, and judgment is rendered against him for that reason, it is as if he had declined to amend in the first instance.' "

We quote the following from the case of *Wolf v. District Court,* 235 Fed. 69, 73 (C. C. A.):

"It appears that the Supreme Court of the State of California has not yet acted upon an appeal in case No. 50811 taken from the judgment of the lower state tribunals, and inasmuch as that court will apparently be called upon to decide the issues tried in the action to quiet title, it is clear to us, that the federal court ought, at least at this time, to decline to pro-

> ceed with the case before it. By proceeding in the federal court a judgment might be rendered which would be in conflict with the one rendered by the state court, and create that confusion deprecated by the Supreme Court, where attempts have been made to transfer matters standing for judgment in the one court to the other."

We quote the following from the case of *Robinson v. Wemmer,* 253 Fed. 790, 794 (C. C. A.):

> "It appeals to this court that complainant, having already submitted to the jurisdiction of the state court through his answers, is no longer in position to press this complaint, whether or not he might have done so originally; nor do we regard the allegation that the venue of the state court is hostile to him as one which would tend to confer jurisdiction upon this court. If he is entitled to any protection from such assumed hostility, he must press for it before some state tribunal."

We submit that the defendant in error in the instant case, by filing his suit in the Superior Court for the County of Santa Clara, and by allowing that suit to proceed to the point of the decision of a trial upon the merits (i. e., the hearing of the general demurrer), thereby submitted as fully, if not more fully to the jurisdiction of the State court, than did the complainant in the case of *Robinson v. Wemmer* (supra), by the mere act of filing answers.

In the pertinent case of *Hyatt v. Challiss,* 55 Fed. 267 (C. C.), the court said:

> "This is an action of ejectment. The action was originally brought in the district court

for the county of Atchison, and a trial upon the merits was had in that court. On the 28th day of January, 1888, a judgment was rendered in favor of the defendant Challiss. Thereupon the plaintiff and certain other defendants (under the statute of Kansas) caused a notice to be entered on the journal that they applied for an order setting aside and vacating the said judgment, and granting another trial of the case. The statute under which these proceedings were had is in the following language:

'In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.' Section 4702, *Gen. St. Kan.*

Section 4703 provides:

'No further trial shall be had in such action, unless for good cause shown a new trial be granted, or the judgment reversed, as in other actions.'

After obtaining the new trial upon demand, as provided by the statute, the cause was continued until the next term of the court, and upon being called for trial at the next term, to wit, on the 9th day of September, 1889, the plaintiff declined to proceed to trial, but dismissed his action, and thereafter, on December 3, 1890, brought his action in this court. These proceedings were all made to appear by the answer of the defendant Challis in this action, a transcript of the proceedings in the state court being incorporated therein, and upon the pleadings he asks for judgment.

The state district court for Atchison county had jurisdiction of the cause. One trial was had in that court; a new trial granted, not for

error, but as of right, under a statute giving a second trial upon demand; and the question now to be settled is whether, after these proceedings had in the state court, the plaintiff can dismiss his action there when the case is called for trial a second time, and then bring his case in the federal court. This, I think, the plaintiff cannot do. *If he wished to have his case tried in the federal court, he should have brought it there in the first instance. This he had the unquestioned right to do; but he selected his tribunal, and sought to litigate his rights in the state court,* and *had one trial in that court, which resulted in judgment against him.* He then demanded a new trial in that court under the statute, which was granted, and procured the judgment entered against him on the first trial to be set aside. If the first judgment had not been set aside under the statute, it would have been final. By procuring that judgment to be set aside, without cost, under the statute, which was a part of the proceedings authorized, plaintiff waived his right to resort to this tribunal."

In refusing leave to amend the answer, Hon. Wm. C. Van Fleet said (Tr. pp. 95, 65):

"An alien may have the right to resort to either one of two tribunals. He has a right to go into the state court. He, like any other suitor, has his right to dismiss at any time; he may for reasons best known to himself, dismiss; that does not preclude him of the right to proceed in any tribunal that is open to him. If you have anything that runs counter to that, I would like to hear it.

There is no doubt about the principle that if one seeks to have his rights determined in one tribunal, and there is a definitive and binding judgment in the case, he cannot go to an-

other tribunal and be heard on the same matter. He has had his day in court. But these principles have application only in the character of instances I have indicated. It must be a final determination upon the merits. *It is true the final determination of the merits may be had upon demurrer.*

* * * * * * *

If this is to be pleaded as *res adjudicata,* I do not think the statement made brings it within the doctrine of *res adjudicata. A demurrer had been sustained, and the parties given a right to amend.*"

It thus appears that the Honorable Judge of the trial court based his decision on the theory that the defendant in error had the right to dismiss his case in the State court after decision against him and to commence anew in the Federal court.

We beg leave to submit, however, that any dismissal of the action in the State court, entered by the Clerk upon the request of the defendant in error subsequent to the sustaining of the demurrer, was a nullity and, therefore, this action in the State court still remains open (Section 581, *C. C. P.; Goldtree v. Spreckels,* 135 Cal. at p. 666).

The demurrer in the Superior Court action (Tr. p. 89) is based in part upon the ground that the complaint failed to state facts sufficient to constitute a cause of action; and the opinion of the Judge of the Superior Court in sustaining that demurrer (Tr. p. 94) clearly shows that his decision was based upon the failure of the complaint to state facts sufficient to constitute a cause of action. He

held that the defendant in error was in default with respect to an important obligation resting upon him and therefore could not maintain the action. In this connection the Judge of the Superior Court of Santa Clara County in his decision stated:

> "The interest was to be paid independently of the non sale of the security. Hence on the face of the pleadings plaintiff was in default of the payment of $819.72 in interest on December 1st, 1920. Demurrer sustained" (Tr. p. 95).

We respectfully submit that the order sustaining the demurrer of the Superior Court was a final determination of the action, in view of the fact that plaintiff (defendant in error) failed to amend his complaint or to take any other action toward an appeal—such as having a formal judgment entered. He did not avail himself of the right to amend his complaint, and thereby admitted that the demurrer was well taken. He elected to accept that decision. He submitted himself to the jurisdiction of that court and is bound by its decision. *He invoked that jurisdiction* and sought to escape it only after an *adverse decision.* The District Court was without jurisdiction in the case because of the prior decision of the State court and that prior decision was called to the attention of the Federal court (there being no dispute as to the authenticity of the papers or as to the facts therein set out).

In view of the foregoing we respectfully urge that the plaintiffs in error be given a rehearing.

(All italics and capitals ours.)

Dated, San Francisco,
May 16, 1923.

Respectfully submitted,
EDWIN A. WILCOX,
FRY & JENKINS,
BERT SCHLESINGER,
Attorneys for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
May 16, 1923.

BERT SCHLESINGER,
Of Counsel for Plaintiffs in Error and Petitioners.